No. 82-1138

IN THE

Supreme Court of the United States

October Term, 1982

VOLVO OF AMERICA CORPORATION, a Delaware corporation; and AKTIEBOLAGET VOLVO, a Swedish corporation,

Petitioners,

vs.

CHARLENE P. ROSACK, on behalf of others similarly situated,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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& WALKER,
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I.

The California Court of Appeal Has Certified a Class Where the Only Named Plaintiff Is Not Representative or Typical of the Class.

Respondent concedes that the Trial Court found that the plaintiff was "not representative" of the purported class. (Memo. Opp. at page 4). Respondent also concedes that the Court of Appeal "deferred" to this finding. (Memo. Opp. at page 5). But respondent argues that there is no constitutional question presented by the California Court of Appeal's decision because that court nevertheless ruled that the class must be certified with respondent as "class representative." (Memo. Opp. at page 3).

This argument is patently circular. It is precisely this amazing ruling that Volvo is attacking. The only question on this writ is whether it is unconstitutional to certify a class with a named plaintiff who is *not* representative or typical of the class. Incredibly, the California Court of Appeal has ruled that such a certification is permissible. And it is precisely this incredible ruling that Volvo challenges as an unconstitutional denial of due process.

The authorities which demonstrate that such "headless" class actions are unconstitutional are set forth in Volvo's petition and will not be repeated here. Respondent does not contest these authorities, but instead seeks to mischaracterize the holding of the California Court of Appeal.

II.

The California Court of Appeal Expressly Held That an Uninjured Plaintiff Could Represent an Injured Class.

Respondent concedes that she paid $612 more than the sticker price for her Volvo. Further, respondent concedes that the Court of Appeal ruled that the fact she paid more than the sticker price and therefore could not have been injured "has no bearing on her ability to represent the class of purchasers." (Memo. Opp. at page 4). The reason for this outrageous result is that the Court of Appeal held that, regardless of the actual price paid, a generalized injury to every Volvo purchaser can be presumed from the mere allegation that a price-fixing conspiracy existed:

> If base prices are raised, generalized injury results regardless of the purchaser's individualized negotiating abilities. The possibility that some members of the class may be injured to a lesser extent or *even not at all* will not . . . defeat class certification.

(Appendix, A20, emphasis supplied).

Respondent's argument that she was injured by an alleged conspiracy to "fix" the federally-mandated sticker price on Volvo automobiles sidesteps this issue completely and does not dispute the clear rule established in the cases decided by this Court and cited by Volvo which hold that such "across-the-board" presumptions in class actions are unconstitutional. *General Telephone Co. of Southwest v. Falcon*, 50 U.S.L.W. 4638 (U.S. June 14, 1982); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977).

III.

Respondent's Argument That She Was Injured Because the Federal Sticker Price Was Fixed at an Uncompetitive Level Is Contrary to the Record in This Case and the Law.

Respondent has *conceded* that if she is not a member of the purported class of injured Volvo purchasers, then her certification as a class representative violates Volvo's constitutional right to due process. (Mem. in Opp. page 18). Respondent argues for the first time in this case that she was injured by an alleged conspiracy to "fix" the federally-mandated sticker price on Volvo automobiles. (Mem. in Opp. at pages 15-16).

Respondent's argument lacks any support in either the record in this case or in other case precedents. The sticker price is indeed fixed, but it is *legally fixed by federal statute and it cannot provide the basis for any antitrust claim. In re Nissan Antitrust Litigation*, 577 F.2d 910, 916 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

The fact that respondent is *compelled* to make such an argument demonstrates the fatal flaw in her purported class action:

(1) Respondent alleges that the prices paid for Volvo automobiles were illegally "fixed" at non-competitive levels.

(2) Respondent further alleges that Volvo prices were "fixed" as a result of a conspiracy between Volvo and all of its dealers to refuse to give customers discounts off the sticker price.

(3) But respondent paid *$612 more than the sticker price* and therefore cannot have been injured by any alleged price-fixing conspiracy.

If respondent were simply less successful than most customers in negotiating a "fixed" discount, she might claim to have been injured. But it is an uncontested fact that respondent did not conduct any price negotiations at all. She was willing to and did pay a premium above the sticker price for her Volvo. Under these circumstances, respondent cannot have been injured by any anticompetitive conduct and so cannot represent a class of purchasers who allegedly were injured.

IV.

None of the Case Authorities Cited by Respondent Apply to the Facts of This Case.

The bulk of respondent's opposition papers consists of an analysis of federal antitrust class action precedents. But all of the cases cited by respondent involve alleged price-fixing conspiracies in which the base price was fixed by illegal conduct.[1]

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[1]Thus, the cases cited by respondent involve sales of linen supplies, *Presidio Golf Club v. National Linen Supply Corp.*, 1976-2 Trade Cases ¶61,221 (N.D. Cal. 1976); filling station leases, *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3rd Cir. 1977); sugar, *Eastern Sugar Anti-trust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976); plywood, *In re Plywood Anti-trust litigation*, 1976-1 Trade Cases ¶60,805 (E.D. Pa. 1971); and paper bags, *Hedges Enterprises Inc. v. Continental Group*, 81 F.R.D. 461 (E.D. Pa. 1979).

There is not a single case, whether federal or state, which holds that a statutorily-mandated sticker price could be illegally fixed.

Similarly, all of the cases cited by respondent involved negotiated prices *relative to* a fixed price. Not one of these cases holds that a class representative who does *not* negotiate and suffers *no* injury can nonetheless adequately represent an injured class.

V.
Conclusion.

The California Court of Appeal has certified an uninjured plaintiff as the representative of a purported class of 50,000 Volvo purchasers with an alleged exposure estimated by plaintiff to be between $30 million and $50 million. As shown in Volvo's Petition, the California court's ruling has denied Volvo's due process rights to *fully* adjudicate its defenses to the claims of absent class members because of the absence of a representative plaintiff, and to *finally* adjudicate those claims because of the possibility of collateral attack.

Respondent has conceded that this result is constitutionally impermissible, and her argument that it is not the result in this case is without merit. The sticker price on Volvos cannot possibly have been fixed by an illegal conspiracy and the fact that respondent paid a premium above that price for her Volvo cannot possibly give rise to an antitrust claim. To embroil Volvo in a costly and complex class action on

the basis of these facts constitutes a denial of due process which petitioners respectfully submit merits review and redress by this Court.

Dated: February 16, 1983.

Respectfully submitted,

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